Court of Appeals Rules NSA Is Protected From Disclosure

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The National Security Agency cannot be forced in a lawsuit to disclose whether it has intercepted the communications of specific individuals or groups through its secret monitoring capabilities., the U.S. Court of Appeals ruled here yesterday.

The ruling, upheld a claim of "state secrets privilege" made by the secretary of defense and makes NSA virtually immune from suits by such individuals or groups, according to attorneys involved in the case.

Calling the state secrets privilege "absolute," U.S. Circuit Judge Roger Robb said, "a ranking of the various privileges recongnized in our courts would be a delicate undertaking at best, but it is quite clear that the privilege to protect state secrets must head the list."

The ruling came in an American Civil Liberties Union suit filed on behalf of 27 individuals and groups active in Vietnam was protests. They claim their international wire, telephone and cable conversations were illegally monitored by NSA at the request of law enforcement and intelligence agencies here.

The suit was an outgrowth of disclosures that more than 1,200 Americans were included on "watchlists" used by NSA between 1967 and 1973 under the code names Project Minaret and Project Shamrock. Once a name was a such a "watchlist," NSA computers could scan intercepted communications and locate messages pertaining to that name.

Other defendants in the lawsuit included the Central Intelligence Agency, the Defense Intelligence Agency, the FBI, and three international communications corporations that cooperated with the projects.

The National Security Agency, which has been rarely if ever sued, said it could not even respond to allegations that certain people or groups had been monitored because to do so would "severely jeopardize the intelligence collection mission of NSA by identifying present communications collection and analysis capabilities."

In addition to a public affidavit by the secretary of defense, classified affidavit was presented in secret to the court to support the claim of state secrets privilege and an NSA official gave secret testimony.

U.S. District Court Judge June L. Green upheld the claim of state secrets privilege in connection with Project Minaret—carried out as part of NSA's regular monitoring programs—but denied the claim in connection with Project Shamrock. The Shamrock materials came from a special program of monitoring telegraphic traffic leaving or coming into the United States.

The plaintiffs appealed, saying they objected to the secret proceedings involved in Green's decision and that the state secrets privilege was being invoked broadly by NSA. The government appealed as well, saying the Shamrock materials also should be protected from disclosure.

Judge Robb, writing for himself, U.S. Circuit Judge Malcolm Wilkey and senior U.S. District Court Judge Ronald N. Davies of North Dakota, agreed completely with the government viewpoint.

Robb described the foreign intelligence gathering process "in this age of computer technology" as being "more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair."

"Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate," Robb said.

Robb said he had reviewed the materials at issue and that confirmation or denial that certain persons or groups had been monitored "would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst."

For example, he said, a foreign government or organization that had dealt with a plaintiff whose communications were intercepted could "at the very least be alerted that its communications might have been compromised or that it might itself be a target."

ACLU attorney Mark Lynch said the ruling means NSA cannot be successfully sued by individuals, because no one can establish that their conversations have been picked up by the agency.

"There's no way to get at NSA, because there's no way we can establish standing," Lynch said. Lynch also ex-encourage other agencies" to make pressed concern that the opinion "will the same claim.

The ruling has no direct effect on the other defendants in the case. The NSA claim of privilege was the only issue on appeal at this point.